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No. 391

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In the Supreme Court of the United States

..... TERM, 1969

JOHN O'C. FITZGERALD and CHARLES F. MARINO,

Petitioners,

vs.

LEE A. FREEMAN and RICHARD F. LEVY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Citations of Opinion Below	1
Jurisdiction of this Court	2
In Respect of a Hearing	2
Statutory Provision Believed to Confer Jurisdiction on this Court	2
Question Presented for Review	2
Statute and Canons of Ethics Involved	3
Statement of the Case	4
The Basis for Federal Jurisdiction in the District Court	9
Reasons Why The Writ Should Be Granted	10
I. This Court has upheld Attorney-Client contracts providing for contingent fees unless they are tainted by fraud, mistake, undue influence, oppression or extortion	10
II. The lower courts have consistently followed this Court's decisions in contingent fee contract cases	13
Conclusion	17
Appendix:	
Exhibit "A"—Opinion of the United States Court of Appeals	App. 1
Exhibit "B"—Opinion of the District Court	App. 7
Exhibit "C"—Contract Agreement	App. 14
Exhibit "D"—Informal Opinion No. 870 of the Standing Committee on Professional Ethics of the American Bar Association	App. 17

AUTHORITIES CITED

Cases

PAGE

Gray v. Joseph J. Brunetti Construction Co., 266 F. 2d 809, 818 (3rd Cir. 1959) 13

Hall v. Metropolitan Life Insurance Co., 298 Ill. App. 83 (1st Dist. 1938) 15

Smith v. Kingsport Press, Inc., 263 F.Supp. 771 (E.D. Tenn. 1966) 14

Stanton v. Embrey, 93 U.S. 548, 556, 577 (1876) 10

Taylor v. Bemiss, 110 U.S. 42, 45, 46 (1884) 12

United States v. 115.1238 acres of Land, 101 F.Supp. 796, 799 (D.C. N.J. 1951) 14

Other Authority

Informal Opinion No. 870, Standing Committee on Professional Ethics of the American Bar Association 16

In the
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NO.

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Petitioners.

vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, John O'C. Fitzgerald and Charles F. Marino, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS OF OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in 409 F.2d 427 (1969). It is shown in the Appendix to this Petition as Exhibit A. No opinion of the district court is reported, but it is also shown in the Appendix to this Petition as Exhibit B.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 25, 1959.

IN RESPECT OF A HEARING

On March 11, 1969, an order was entered in the Court of Appeals extending the time to file a Petition for Rehearing until March 24, 1969. On March 24, 1969, a Petition for Rehearing was filed. On May 9, 1969, an order was entered denying Rehearing.

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT

The statutory provision believed to confer jurisdiction on this Court is U. S. C. A. Title 28, Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

Should this Court grant certiorari to review the action of the Courts below in setting aside, *contrary to the decisions of this Court,* a contingent attorney's fee contract where, as here,

(1) the client never complained that the contract was obtained by fraud, mistake or undue influence or was oppressive or extortionate (or even that the fees specified therein were unreasonable); and

(2) the pleadings raised no issue, the record contains no evidence and the district court made no finding that the contingent fee contract was tainted with fraud, mistake, undue influence, oppression or extortion; and

(3) the district court, *sua sponte,* decided that the contingent fee contract was in some way inconsistent with Canons 13 and 34 of professional ethics and arbitrarily awarded the Petitioners fees based on quantum meruit.

STATUTE AND CANONS OF ETHICS INVOLVED

1. The Statute involved in this case is the Illinois Attorney's Lien Act, Chapter 13, Section 14 of the Illinois Revised Statutes. So far as is pertinent here, it reads as follows:

> "Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection or upon which suit or action has been instituted, *for the amount of any fee which may have been agreed upon by and between such attorneys and their clients* or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action" (Emphasis Added).

2. The Canons of Ethics involved in this case are:

> "Canon 13, *Contingent Fees*
>
> A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.
>
> Canon 34, *Division of Fees*
>
> No division of fees for legal services is proper, except with another lawyer, based upon a division of service and responsibility."

STATEMENT OF THE CASE

The Petitioners, John O'C. Fitzgerald and Charles F. Marino (Fitzgerald and Marino), are attorneys. Beginning in 1957, the Petitioners, together with two other attorneys, Joseph Keig, Sr. (Keig) and Victor Neumark (Neumark), represented Radiant Burners, Inc., (Radiant) in a treble damage anti-trust suit against the American Gas Association (AGA) and several of its members which arose from AGA's unlawful refusal to approve a gas burner manufactured and sold by Radiant.

On March 11, 1959, Judge Philip Sullivan of the federal district court for the Northern District of Illinois dismissed Radiant's Complaint for the third time on the ground that it failed to allege a public injury. An appeal was taken to the United States Court of Appeals for the Seventh Circuit. On December 3, 1959, the Court of Appeals affirmed the dismissal of the Complaint, and the Petitioners, together with Keig, petitioned this Court for a Writ of Certiorari. Certiorari was granted by this Court, and the dismissal of Radiant's Complaint was subsequently reversed by this Court in 364 U.S. 656 (1960).

Judge Philip Sullivan died while the case was on Appeal, and, upon it being remanded to the district court, it was assigned to Judge William Campbell.

Radiant then decided to retain Respondents, Lee A. Freeman and Richard F. Levy (Freeman and Levy) to handle the case upon its return to the district court for trial. On December 20, 1960, Fitzgerald, Keig and Neumark entered into an agreement with Radiant which provided that Fitzgerald and Keig, collectively, would re-

ceive for legal services performed by them from the outset of the case to that date an amount equal to 11¼% of all monies, property and other things of value received by Radiant by judgment, settlement, compromise or otherwise (a copy of the contract is shown in the Appendix to this Petition as Exhibit C). Thereafter, on April 19, 1961, Fitzgerald and Keig entered into an agreement with Marino, to divide their fees as follows: Fitzgerald 5 1/16%, Marino 1 1/8% and Keig 5 1/16%.

Shortly prior to October 1, 1965, AGA approved Radiant's gas burner and on that date the treble damage anti-trust suit was settled and dismissed by Judge Campbell. Radiant received $450,000.00, of which Freeman and Levy took 50%, namely $225,000.00 as attorneys fees plus $35,000.00 in expenses. They divided the fees and expenses between themselves and Neumark, who is Levy's father-in-law. However, Radiant, Freeman and Levy refused to pay the Petitioners the amount due them.

Prior to the settlement, the Petitioners gave written notice to Radiant, all Defendants and all attorneys in the treble damage anti-trust suit of their attorney's lien. The Petitioners then filed a Petition in the district court before which the treble damage anti-trust suit had been pending to enforce said lien against the Defendants. Respondents, Freeman and Levy then personally entered the case. They alleged that they had agreed to indemnify the Defendants in this matter. Freeman and Levy were permitted by the district court to intervene over the Petitioner's objection.

Neither Radiant nor any of the Defendants took any part in the attorney's lien proceeding. Respondents, Freeman

and Levy answered the Petition to Enforce the Attorney's Lien alleging that nothing was due the Petitioners because the Petitioners had breached the contingent fee contract, dated December 20, 1960. Respondents, Freeman and Levy also alleged that Petitioners were guilty of laches, that their right to fees had been released by Keig, when he alone assigned his fees to Freeman for $1,000.00 and executed a Release, dated February 6, 1962, and that, if anything, the Petitioners contingent fees should be based on the net amount received by Radiant, namely $190,000.00 after paying Freeman and Levy $260,000.00. At no time has Freeman and Levy, Radiant, or the Defendants in the treble damage anti-trust suit alleged that the contingent fee contract was procured by fraud, mistake, undue influence, or was oppressive or extortionate, or even unreasonable.

The Petitioners and Freeman and Levy entered into a stipulation of facts which was filed with the district court on December 1, 1966.

Judge Campbell of the district court then filed a Memorandum, Findings of Fact, Conclusions of Law and Order, in which he declined to rule on the defenses raised by Freeman and Levy relating to breach of contract, laches and release, but instead declared that he was concerned about the contingent fee contract being inconsistent with Canons 34 and 13 of the Canons of Ethics which relate to division of fees and contingent fees. Accordingly, Judge Campbell set the fees of the Petitioners at $17,500.00, and said:

> "However, these litigants are members of a calling over which this court has supervisory responsibilities and powers and whose business dealings are not limited to the ordinary rules of contracts, but must also comply with the canons of professional ethics.

Even assuming that a valid contract existed between Keig, Fitzgerald and Radiant Burners which effected the substitution of intervenors Levy and Freeman, still I shall not enforce a lien arising from the agreement should it be in anyway inconsistent with the canons of professional ethics. I am concerned here with two of said Canons:

Canon 34, Division of Fees

> No division of Fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

Canon 13, Contingent Fees

> A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

In observance of these Canons, I am more concerned with the value of services or responsibilities which have been contributed to the successful completion of this cause, than with the specific terms of an agreement.

The stipulation filed herein sets forth the extent Attorneys, Freeman, Levy and Neumark, have been compensated for their services. As to the value of the services rendered by all parties, I am fully aware of the proceedings which took place before me and which were handled almost exclusively by intervenors, Freeman and Levy. I have carefully reviewed the stipulation of the parties relating to the services performed by petitioners as well as the full file of this court and the Court of Appeals. I am also fully aware of the initial risk and uncertainty of compensation in this case, and of the nature and value of the recovery in question and the extent that all attorneys of record contributed to the realization of that recovery.

> Based on these facts and considerations, and in furtherance of my responsibility to supervise the reasonableness of the fees in this case, the court sets attorneys fees for petitioner, Fitzgerald, in the amount of $17,500, without interest. Petitioner Marino is to be compensated by Fitzgerald in accordance with the terms of their agreement.
>
> It is further ordered that the above sum is to be paid to petitioner by each of the attorneys who have received compensation from respondent, Radiant Burners, Inc., i.e., Freeman, Levy and Neumark, in direct proportion to the compensation received by each of them."

Petitioners then appealed Judge Campbell's order to the United States Court of Appeals for the Seventh Circuit. They requested that Judge Campbell's order be reversed and the Petitioners' fees be set in accordance with the contingent fee contract. Respondents, Freeman and Levy, took a cross-appeal. In their brief and argument to the Court of Appeals, Freeman and Levy also urged that Judge Campbell's order be reversed, but they contended that the Petitioners were entitled to nothing, or in the alternative to their respective percentages of $190,000.00, that being the amount received by Radiant after paying Freeman and Levy. Nonetheless, on February 25, 1969, the Court of Appeals affirmed Judge Campbell's order based on quantum meruit rather than upon the contingent fee contract and rejected the "all or nothing" legal issue presented by the pleadings in the district court, as well as the briefs and argument to the Court of Appeals. Interestingly, the Court of Appeals found that the defenses raised by Respondents, Freeman and Levy were "unpersuasive". The Petitioners filed a Petition for Rehearing on March 24, 1969, which was denied by the Court of Appeals on May 9, 1969.

THE BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The Petition to enforce the attorney's lien was filed in a treble damage anti-trust suit over which the district court had jurisdiction by virtue of Section 4 of the Clayton Act, U.S.C.A. Title 15, Section 15.

REASONS WHY THE WRIT SHOULD BE GRANTED

There are three important reasons why the Writ of Certiorari should be granted in this case:

FIRST: The decision of the Court of Appeals is in direct conflict with the decisions of this Court relating to attorney-client contingent fee contracts.

SECOND: The decision of the Court of Appeals has sanctioned and encouraged a substantial departure by the district court from the accepted and usual course of judicial proceedings relating to attorney-client contingent fee contracts.

THIRD: The decision of the Court of Appeals calls for this Court to exercise its power of supervision to restore the legal profession's willingness to rely on the validity and enforceability of contingent fee contracts which are untainted by fraud, mistake, undue influence, oppression or extortion.

I.

THIS COURT HAS UPHELD ATTORNEY-CLIENT CONTRACTS PROVIDING FOR CONTINGENT FEES UNLESS THEY ARE TAINTED BY FRAUD, MISTAKE, UNDUE INFLUENCE, OPPRESSION OR EXTORTION.

In *Stanton* v. *Embrey*, 93 U.S. 548 (1876), this Court held (pages 556 and 557):

> "Coming to the merits, the first objection of the plaintiffs in error is that the contract set up in declaration is one for a *contingent compensation.* Such a defense, in some jurisdictions, would be a good one; but the settled rule of law in this court is the other way.

Reported cases to that effect show that the proposition is one beyond legitimate controversy. *Wylie* v. *Coxe,* 15 How. 415; *Wright* v. *Tebbitts,* 91 U.S. 252. Professional services were rendered by an attorney, in the first case cited, in prosecuting a claim against the Republic of Mexico, under a contract that the attorney was to receive five percent of the amount recovered. Valuable services were rendered by the attorney during the lifetime of the claimant; but he died before the claim was allowed. Subsequently, the efforts of the attorney were successful; and he demanded the fullfilment of the contract, which was refused by the administrator of the decedent. Payment being refused, the attorney brought suit; and this court held that the decease of the owner of the claim did not dissolve the contract, that the claim remained a lien upon the money when recovered, and that a court of equity would exercise jurisdiction to enforce the lien, if it appeared that equity could give him a more adequate remedy than he could obtain in a court of law.

Courts of law also adopt the same rule of decision, as sufficiently appears from the second case cited, where the same rule of decision was applied and enforced without hesitation or qualification.

* * *

Professional services, to prepare and advocate just claims for compensation, are as legitimate as service rendered in court in arguing a cause to convince a court or jury that the claim presented or the defence set up against a claim presented by the other party ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to accept such employment, and to receive compensation for their services; *nor can courts of justice adjudge such contracts illegate, if they are free from any taint of fraud, misrepresentation, or unfairness.*" (Emphasis Added).

Again in *Taylor* v. *Bemiss*, 110 U.S. 42 (1884), this Court upheld and enforced a contingent fee contract and stated (pages 45 and 46):

> "It remains to be considered whether there is in this contract of employment anything which, after it has been fully executed on both sides, should require it to be declared void in a court of equity, and the money received under it returned. It was decided in the case *Stanton* v. *Embrey*, 93 U.S. 548, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered.
>
> * * *
>
> This, however, does not remove the suspicion which naturally attaches to such contracts, and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved."

The district court in the instant case did not and could not find that the contingent fee contract was tainted; that the Petitioners had committed a fraud or exerted undue influence upon their client, Radiant; or that a mistake had been made; or that the amount of the contingent fees, namely 5 1/16% for Fitzgerald, and 1 1/8% for Marino, was oppressive or extortionate. There was no issue or evidence before the district court concerning fraud, undue influence, mistake, oppression or extortion. Yet, the district court, *sua sponte* set aside the contingent fee contract—contrary to this Court's long standing holdings expressed in the *Stanton* and *Taylor* cases, *supra*—and ordered that the Petitioners' fees be set on a quantum meruit basis. The

Court of Appeals affirmed the order of the district court, merely noting that it was not necessary for the district court to even find specifically that the contingent fees provided in the December 20, 1960 contract were unreasonable.

II.

THE LOWER COURTS HAVE CONSISTENTLY FOLLOWED THIS COURT'S DECISIONS IN CONTINGENT FEE CONTRACT CASES.

In *Gray* v. *Joseph J. Brunetti Construction Co.*, 266 F. 2d 809 (3rd Cir. 1959), the Court of Appeals for the Third Circuit reversed a district court which had cut a $13,000.00 contingent fee to $7,500.00 on a quantum meruit basis. The Court of Appeals there stated (page 818):

> "It must be observed, parenthetically, that the District Court erred in still another respect in reducing plaintiff's contingent fee even assuming it enjoyed summary jurisdiction with respect to it. It is settled New Jersey law that attorney-client contracts for contingent fees '* * * should not be carved away by the court except in an entirely clear case'. Hughes v. Eisner, supra, [14 N.J. Super. 58, 81 A.2d 397], and, in the absence of unfairness or fraud, where there has been performance by the attorney, the contract '* * * ought not be disturbed by the court, but the parties should be left where they have placed themselves.' Grimm v. Franklin, 1928, 102 N.J. Eq. 198, 140 A. 236, 239, affirmed E. & A. 1929, 110 N.J. Eq. 573, 146 A. 914."

The Court of Appeals found that the district court (161 F. Supp. 151) had erred in finding as follows (page 154):

> "I adhere to my previous ruling that an agreement for a contingent fee will not be condemned and struck down in absence of evidence that it is excessive or unreasonable to such a degree that it compels a finding that the attorney intended to over-reach. Such is

> not here the case, but the fact that the contingent fee arrangement is not condemned *per se* does not divest this Court of jurisdiction to inquire into its reasonableness. It has long been and still is the law of New Jersey that when a fee agreement between attorney and client is called in question by the client, a Court in the exercise of its equitable discretion will sustain the agreement only to the extent of securing to the attorney reasonable compensation under the case * * *. Soper v. Bilder, Ch. 1917, 87 N.J. Eq. 564, 569, 100 A. 858, 860; Hughes v. Eisner, App. Div. 1951, 14 N.J. Super, 58, 81 A. 2d 394, appeal dismissed, 1951, 8 N.J. 228, 84 A.2d 626."

In *United States* v. *115.1238 acres of Land,* 101 F. Supp. 796 (D.C. N.J. 1951), a New Jersey district court held (page 799):

> "There is nothing in the evidence before me to indicate anything other than that the duly authorized officers of the City, with full knowledge of the facts, and in the absence of any fraud, entered into the contract under no compulsion of any kind, and the contract was the result of their own free will. Numerous cases were set forth in the briefs bearing on the subject of contingent fees. I gather from the cases examined that in the absence of fraud or undue influence, the Courts will not set aside an attorney's contract for contingent fees unless it appears that the fee is exorbitant."

Also, this Court's decision in the *Taylor* case, *supra,* was cited in *Smith* v. *Kingsport Press, Inc.,* 263 F.Supp. 771 (E.D. Tenn. 1966).

In the instant case, only the Petitioner's client, Radiant, could have properly objected to the contingent fee contract of December 20, 1960. However, it did not. The Defendants against whom the attorneys lien was exerted not only did not but could not complain.

In *Hall* v. *Metropolitan Life Insurance Co.*, 298 Ill. App. 83 (1st Dist. 1938), which is the only Illinois decision found on this point, the Court clearly held that in an action to enforce an attorney's lien, where the client did not complain, the defendant against whom the lien was sought, could not contend that the fee contracted for was unreasonable and unconscionable. The Court there said:

> "The first criticism leveled at the judgment is that the contract for a fee of one-third of the amount collected is unreasonable and unconscionable, and in support of its position defendant cites Berkos v. Aetna Life Ins. Co., 279 Ill. App. 243. There Berkos, an attorney, filed a petition for an attorney's lien in a case that arose out of two certificates issued to Candelario de la Rosa under a group life insurance policy, who became ill and died while his claim was pending, and his father was granted permission to intervene and filed an answer contesting the claim of Attorney Berkos. That case is not in point. The father of insured had a clear right to raise his voice in objection to the reasonableness of the fee sought. In the case before us the dispute is between the attorney and the corporation against which he asserts a lien. The client, Grace Smith, appeared only as a witness and did not challenge the claim of plaintiff for the enforcement of a lien against defendant. Defendant is not in a position to contend that the fee contracted for was unreasonable and unconscionable."

Moreover, the Respondents, Freeman and Levy, (who received 50% of the $450,000.00 cash settlement for their attorney's fees) together with Levy's father-in-law, Neumark, signed and approved the contingent fee contract. They did not at any time contend that the contract was inconsistent with the Canons of Ethics as found by the district court and affirmed by the Court of Appeals, and they could not so contend.

The Standing Committee on Professional Ethics of the American Bar Association, in Informal Opinion No. 870, dated August 4, 1965, stated as follows:

> "It is the decision of the Committee that the attorney should not interpose as a reason for not carrying out the agreement he made that the agreement was not ethical. This matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement. When two lawyers have participated in an unethical agreement one of them should not, where no one else is involved, set up the unethical agreement against the other."

A copy of the above opinion is shown in the appendix to this Petition as Exhibit D.

Attorneys cannot risk taking cases on a contingent fee basis in the face of the decision of the Court of Appeals in this case. As consistently held by this court, in the absence of over reaching on the attorneys' part, whether it be called fraud, mistake, undue influence, oppression, extortion or just plain "unreasonableness", the contingent fee contract should be honored.

The amount involved in this case, namely $10,845.55 (the difference between the Petitioners' percentage of the $450,000.00 cash settlement called for under the contingent fee contract and the $17,500.00 awarded the Petitioners on a quantum meruit basis), plus the percentage of the value of the AGA approval of Radiant's gas burner (which Petitioners claim to be part of the settlement) is important only to the Petitioners. However, the adverse affect which this case can have on private litigants in treble damage anti-trust, personal injury and other cases customarily

handled by attorneys on a contingent fee basis may well be disastrous. How many of these litigants can afford to compensate an attorney on an hourly or other non-contingent basis? On the other hand, how many attorneys can afford to take such cases on a contingent fee basis with the future uncertainty generated by the decisions of the district court and Court of Appeals in this case.

CONCLUSION

For the reasons herein assigned, this Court ought, in the interest of the appropriate administration of attorney-client contingent fee contracts, grant a Writ of Certiorari in this case.

Respectfully submitted,

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APPENDIX

Appendix

EXHIBIT "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

Nos. 16813, 16814

JOHN O'C. FITZGERALD and CHARLES F. MARINO,
Petitioners-Appellants,

v.

LEE A. FREEMAN and RICHARD F. LEVY,
Intervenors-Appellees.

No. 16814

LEE A. FREEMAN and RICHARD F. LEVY,
Intervenors-Appellants,

v.

JOHN O'C. FITZGERALD and CHARLES F. MARINO,
Petitioners-Appellees.,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 25, 1969

Before KILEY, CUMMINGS and KERNER, *Circuit Judges.*

KILEY, *Circuit Judge.* This proceeding to enforce an attorney's lien under the Illinois Lien Act[1] involves a controversy between lawyers. The district court's judgment ordered the attorneys-intervenors to pay petitioners $17,500 as fees. Petitioners have appealed, and intervenors have cross-appealed, from the judgment. We affirm.

The proceeding before us arises from the case of *Radiant Burners, Inc.* v. *American Gas Assoc., Inc.,* 320 F.d 314 (7th Cir. 1963), and 273 F.2d 196 (7th Cir. 1959), *rev'd,* 364 U.S. 656 (1961), an anti-trust treble damage suit. The suit was begun in 1957 in the district court where defendant American Gas prevailed. This court affirmed, 273 F.2d 196 (1959), but the Supreme Court reversed, 364 U.S. 656 (1961). Subsequently the suit was settled and on October 1, 1965, by an agreed order, was dismissed.

Petitioners served their notice of lien on July 26, 1965. On November 5, 1965, with leave of court, they filed their verified petition to enforce the lien. Petitioners relied upon a contract between Radiant, and attorneys Keig and Neumark, and petitioner Fitzgerald, made December

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[1] Ill. Rev. Stat., Ch. 13 § 14 (1967), which provides in part: Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or agreement, for a reasonable fee, for the services of collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action.

20, 1960, under which Radiant noted an earlier contract of employment of Keig and Neumark as its attorneys in the *American Gas* case, and expressed its desire to substitute other attorneys in the case and to settle the fees of "attorneys Keig, Neumark and Fitzgerald for the work done to date." Radiant agreed to pay Keig and Fitzgerald "11¼%, collectively" of whatever was recovered in the *American Gas* case by judgment or settlement and "22½% . . . of all moneys awarded by the Court as fees. . . ." Intervenors' answer asserted breach of the contract by Fitzgerald and denied any contract right of petitioner Marino, a lawyer employed in Fitzgerald's office, to fees.

The district court ordered intervenors to pay petitioners $17,500 which is $10,845.55 less than petitioners sought in the lien enforcement proceeding under the December, 1960, contract, and which is $17,500 more than intervenors contend petitioners should have, in view of their alleged breach. The court disallowed interest claimed by petitioners.

The district court's Memorandum discussed the various legal issues raised with respect to the December 20, 1960, contract and decided that since the controversy was between attorneys, the ordinary legal rules of contract should not alone be determinative, but there must also be compliance with the canons of professional ethics under the court's supervision over contingent attorneys' fees. The court considered the stipulation of facts signed by petitioners and intervenors, the pleadings and affidavits filed, the files of the district court and of this court in the *American Gas* case, and the relative contributions of petitioners and intervenors to the successful outcome of Radi-

ant's suit—all in the light of Canons 13 and 34 of the Code of Ethics.[2] The court's judgment was based on quantum meruit rather than upon the contract and thus rejected the "all or nothing" legal issue presented by the pleadings.

The record shows that petitioners performed services[3]

---

[2] Canon 13, Contingent Fees

A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

Canon 34, Division of Fees

No division of fees for legal service is proper, except with another lawyer, based upon a division of service or responsibility.

[3] 1. Preparation of (a) Complaint, Amended Complaint and Second Amended Complaint; (b) Briefs in opposition to AGA's Motion to Quash service of Summons and Affidavits in support thereof; (c) Briefs in opposition to Defendants' Motions to Dismiss Complaint, Amended Complaint and Second Amended Complaint; (d) Briefs filed in the United States Court of Appeals for the Seventh Circuit in connection with appeal from dismissal of Second Amended Complaint, as well as Petition for Rehearing; and (e) Petition for Writ of Certiorari filed in the Supreme Court of the United States.

2. (a) Research of applicable statutes and case law; (b) Discovery proceedings, including interrogatories addressed to various Defendants and depositions of employees of various Defendants; (c) Conferences with William P. Ayers, President of Radiant, at Fitzgerald's office, Ayer's home and Radiant's offices; (d) Personal appearances in Court in connection with Motions presented by either themselves or Defendant's attorneys; and (e) Oral argument in the United States Court of Appeals for the Seventh Circuit.

for Radiant from July 7, 1957, until June 6, 1960, when the Supreme Court granted certiorari. Thereafter both in successful argument before the Supreme Court and in achieving a settlement of the *American Gas* case for $450,000—from which $260,000 fees and expenses were paid to intervenors and attorney Neumark—intervenors performed legal services for Radiant.[4]

The parties agree that the district court possessed the power it applied in awarding the fees. Each party argues the power was not properly applied. The court was not required to find specifically, as petitioners contend, that the contingent fees provided in the December, 1960, contract were unreasonable. That finding is implicit in the decision. Nor can we say that the court ignored the December 20, 1960, contract. The memorandum decision states the contrary. Moreover, the argument by petitioners that the court did not make computations of time spent by petitioners in service of Radiant does not have merit since there is an indication petitioners did not keep time records and made no effort before the court to introduce records.

---

[4] Preparation and filing of third amended complaint; discovery proceedings, including examination, copying, analysis and categorizing of documents, deposition proceedings and interrogatories; interviews with professional and other witnesses; preparation of and response to numerous motions relating to discovery; attendance at regularly scheduled pretrial conferences; legal research; preparation of briefs in connection with corporate attorney-client privilege; argument before the United States Court of Appeals for the Seventh Circuit; preparation of witnesses for depositions; and negotiations for and consummation of settlement.

This court's decision in *Brick* v. *Hirsch,* 331 F.2d 251 (7th Cir. 1964), is of no aid to petitioners. There the district court's decision did not involve Canon 13 and the court's supervisory power, but was based on resolving the credibility of witnesses on the vital question of the existence of the fee contract.

We see no need of prolonging this opinion to discuss points raised by intervenors, in their cross appeal. They are mainly arguments from the law of contracts. Suffice to say we have considered them and find them unpersuasive to overturn the district court judgment, upon the circumstances in this record. And we see no basis on the record for an imposition upon intervenors of the interest claimed by petitioners.

The judgment is AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

EXHIBIT "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RADIANT BURNERS, INC. an Illinois corporation,

Plaintiff,

vs.

AMERICAN GAS ASSOCIATION, INC., et al.,

Defendants,

JOHN O'C FITZGERALD and CHARLES F. MARINO,

Petitioners,

vs.

AMERICAN GAS ASSOCIATION, INC., et al.,

Respondents.

No. 57 C 1167

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Campbell, C.J.—

Petitioners, John O'C Fitzgerald ('Fitzgerald') and Charles F. Marino ('Marino') have filed to enforce an attorneys lien. The lien relates to professional services rendered in the above captioned cause between 1957 and 1960 and arises from an agreement entered into by petitioners, and attorney Joseph Keig, Sr., with Radiant Burners, Inc. by its President, William P. Ayers. The Agree-

ment was assented to by attorney Lee A. Freeman ('Freeman') and Richard F. Levy ('Levy'), intervenors in this case.

Some brief background information is required for a complete understanding of this case. In 1957 Radiant Burners retained Joseph Keig, Sr. and Attorney Victor Neumark to prosecute its case against the American Gas Association. Keig, in turn, brought Fitzgerald into the case. Petitioner Marino worked in the office of Fitzgerald. All four filed their appearance. Keig, Neumark and Fitzgerald signed the pleadings and apparently, Fitzgerald and Marino did much of the work on the motions related to three complaints filed in the District Court and, after the complaint was dismissed by the District Court, prepared the briefs for the Seventh Circuit where Marino argued—unsuccessfully—the public injury question. Fitzgerald and Marino then prepared the successful petition for certiorari filed in the United States Supreme Court.

At this point Neumark brought in Levy who successfully argued the public injury question before the Supreme Court. (The extent to which Marino and Fitzgerald worked on the briefs filed in the Supreme Court is in dispute.) Shortly after the Supreme Court reversed the Court of Appeals on the public injury question, Freeman and Levy took over the case.

To accomplish the substitution of attorneys Radiant Burners entered into an agreement with Keig, Neumark and Fitzgerald dated December 20, 1960. By the terms of the agreement Radiant Burners agreed to pay Fitzgerald and Keig for work done by them an amount equal to 11¼% collectively of all monies, property and other things of value recovered or obtained by Radiant Burners by judgment, settlement, compromise or otherwise and 22½%

of all monies awarded by the court as fees due from defendants and to the plaintiffs' attorneys. (Since no fees were awarded by the court the 22½% provision is not in issue.) The agreement was assented by Freeman and Levy. Parenthetically, petitioner Marino was not a party to the agreement. Since he was employed by Fitzgerald, however, his efforts may properly be credited to Fitzgerald.

After this agreement was executed, Fitzgerald, Keig and Marino entered into their own agreement for the distribution of whatever amounts they might recover from their agreement with Radiant Burners. Fitzgerald and Keig were each to receive 45% of their total recovery, while Marino would receive 10%. Thus, petitioners claim that Fitzgerald is entitled to 5.0629% and Marino 1.1250% of all monies, property and other things of value recovered by Radiant Burners. Upon this background, Fitzgerald and Marino filed their petition.

The petition, answer, stipulation and affidavits and briefs filed herein raise considerable factual and legal questions relating to whether a valid contract was ever executed; whether it was breached; the effect of a release signed by Joseph Keig, Sr.; and the interpretation of a number of the terms of the agreement, including the amount in controversy.

The Agreement of December 20, 1960

Freeman and Levy, in their brief in opposition to the petition, argue that the agreement of December 20, 1960, giving rise to the claim was breached by petitioners at the outset and that it is of no force and effect. In support of this argument, Freeman and Levy claim that the terms of the agreement were based on the representations of

Keig and Fitzgerald that they possessed meaningful files and memoranda; that they had devoted time to the assignment and had maintained time records; and that they would execute withdrawals from the proceedings. They further allege that these representations were false. To support this argument they have filed an affidavit of the President of Radiant Burners, William P. Ayers. Ayers also states in his affidavit that he never retained Fitzgerald or Marino; that he had never consulted with Fitzgerald or Marino on any legal or factual matter involved; and that he knows of no services performed by Fitzgerald. To a certain extent, the sworn statement of Ayers is contradicted by the stipulation filed by the parties which sets forth the rather substantial services performed by Fitzgerald, Marino and Keig. (P. 4 and Ex. A) The stipulation also states that Fitzgerald and Keig turned over all of their files in this case. (PP. 6 and 7)

Fitzgerald and Marino filed affidavits stating that they performed substantial work on the case; that they had consulted with Ayers at Fitzgerald's office and at Ayers home; and, that Ayers read briefs filed under their names. Fitzgerald and Marino have also filed an affidavit of Keig, (who is, of course, not involved in this dispute) which states and represents that Marino and Fitzgerald consulted with Ayers at Fitzgerald's office and at Ayers' home and that Ayers read briefs bearing the names of Fitzgerald and Marino.

The Affidavits of Fitzgerald, Marino and Keig also deny that there were any representations that they had certain documents or that they had maintained time records. They further represent that they turned over any and all files, memoranda, etc., to Freeman and Levy and have completely complied with the terms of the agreement.

They state further that they did not withdraw from the case because to do so would have jeopardized their lien. (The agreement did not require petitioners to withdraw from the litigation).

The Release of Keig

On February 6, 1962, Keig executed an assignment and release of any interest he may have in professional fees from this case. The release also states that any work performed by Fitzgerald in connection with the case was performed at Keig's request and that Fitzgerald at no time was retained by Radiant Burners, and was not requested by Radiant Burners to render such services. (Stip. Ex. G) Thus, the intervenors argue, Fitzgerald and Marino were brought into the litigation by Keig, who has been fully compensated, and they must now look to Keig for any fees due them. (Keig assigned his claim for fees to Freeman and was paid $1,000 for the release.) (Stip. 13)

In his affidavit, previously referred to, Keig states that before executing the release he stated to Freeman that he was not releasing any claim of Fitzgerald or assigning any fees to which Fitzgerald was entitled.

There are also a number of other factual and legal disputes including the value of the recovery by Radiant Burners, Inc. from the case and the effect of a cancellation notice sent to Fitzgerald by Radiant Burners on March 8, 1961, advising Fitzgerald that it does not recognize his right to share in any portion of the proceeds of the case. Were the litigants laymen in a commercial enterprise, these questions might require resolution—as would the many questions suggested by the above recited facts. However, these litigants are members of a calling over which this court has supervisory responsibilities and powers and

whose business dealings are not limited to the ordinary rules of contracts, but must also comply with the canons of professional ethics.

Even assuming that a valid contract existed between Keig, Fitzgerald and Radiant Burners which effected the substitution of intervenors Levy and Freeman, still I shall not enforce a lien arising from the agreement should it be in anyway inconsistent with the canons of professional ethics. I am concerned here with two of said Canons:

> Canon 34, Division of Fees
>
> No division of fees for legal service is proper, except with another lawyer, based upon a division of service or responsibility.
>
> Canon 13, Contingent Fees
>
> A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

In observance of these Canons, I am more concerned with the value of services or responsibilities which have been contributed to the successful completion of this cause, then with the specific terms of an agreement.

The stipulation filed herein sets forth the extent Attorneys Freeman, Levy and Neumark have been compensated for their services. As to the value of the services rendered by all parties, I am fully aware of the proceedings which took place before me and which were handled almost exclusively by intervenors Freeman and Levy. I have carefully reviewed the stipulation of the parties relating to the services performed by petitioners as well as the full file of this court and the Court of Appeals. I am also fully

aware of the initial risk and uncertainty of compensation in this case, and of the nature and value of the recovery in question and the extent that all attorneys of record contributed to the realization of that recovery.

Based on these facts and considerations, and in furtherance of my responsibility to supervise the reasonableness of the fees in this case, the court sets attorneys fees for petitioner, Fitzgerald, in the amount of $17,500, without interest. Petitioner Marino is to be compensated by Fitzgerald in accordance with the terms of their agreement.

It is further ordered that the above sum is to be paid to petitioner by each of the attorneys who have received compensation from respondent, Radiant Burners, Inc., i.e., Freeman, Levy and Neumark, in direct proportion to the compensation received by each of them.

/s/ William J. Campbell
Chief Judge

Dated: Feb. 21, 1967.

EXHIBIT "C"

AGREEMENT

THIS AGREEMENT entered into this 20th day of December, 1960, between JOSEPH KEIG, SR. (herein called "Keig"), JOHN O'C. FITZGERALD (herein called "Fitzgerald") and VICTOR NEUMARK (herein called "Neumark"), hereinafter referred to as the attorneys, and RADIANT BURNERS, INC. (hereinafter sometimes referred to as the "Client");

WHEREAS, Neumark and Keig have heretofore entered into a contract of employment as attorneys at law for RADIANT BURNERS, INC. in respect of an Anti-Trust law suit, Radiant Burners, Inc. v. American Gas Association, et al., which was heretofore filed in the United States District Court of the Northern District of Illinois, No. 57 C 1167, now pending as Case No. 73, October Term, 1960, in the United States Supreme Court for determination; and

WHEREAS, the Client desires to substitute other attorneys for the attorneys, Keig and Neumark, and FitzGerald, who was brought into the litigation by Keig, and also desires to settle the fees of the attorneys, Keig, Neumark and FitzGerald for work done to date;

NOW, THEREFORE, it is agreed by and between the parties hereto:

1. That all contracts heretofore existing between the parties in respect of the employment of the attorneys by RADIANT BURNERS, INC. are hereby declared to be terminated and void;

2. The Client agrees to pay for work heretofore completed by them as follows. Keig and FitzGerald, an amount

equal to eleven and one-fourth per cent (11¼%) collectively, of all moneys, property, and other things of value recovered or obtained by RADIANT BURNERS, INC. by judgment, settlement, compromise or otherwise, and Neumark, eight and three-fourths per cent (8¾%) of all moneys, property and other things of value recovered or obtained by RADIANT BURNERS, INC. by judgment, settlement, compromise or otherwise. Keig and FitzGerald, collectively, shall be paid twenty-two and one-half per cent (22½%) and Neumark seventeen and one-half per cent (17½%) of all moneys awarded by the Court as fees due from the defendants, or any of them, to the attorneys for the plaintiff or such attorneys in respect of the payment of reasonable attorneys fees;

3. Attorneys agree that they will within the next six (6) weeks submit to the Client a statement of all time expended by them to date in connection with the case, and that they will cooperate with the Client and its new attorney in presenting to the Court any claim which may be asserted as and for attorneys' fees; attorneys, however, shall not be obliged to perform any future services on this case;

4. Attorneys expressly release any and all claims which they have against RADIANT BURNERS, INC. except those provided in this Agreement, and RADIANT BURNERS, INC. hereby expressly releases any and all claims which it has against any of the attorneys (except those provided for in this Agreement);

5. The Client agrees that it will neither perform or omit to perform any act which will deprive the attorneys of their rights herein granted, and further agrees that the fees herein granted to the attorneys shall constitute a lien upon any and all recovery received from the client, whether in satisfaction of judgment, settlement or compromise;

6. Unless the Client shall have retained Richard Levy and Lee Freeman, collectively, in writing, as an attorney for the plaintiff, RADIANT BURNERS, INC., in the case of Radiant Burners, Inc. v. American Gas Association et al, now pending in the United States Supreme Court as Case No. 73, October Term, 1960, within thirty (30) days, this Agreement shall terminate and the previous agreement between JOSEPH KEIG, SR. and VICTOR NEUMARK on the one hand, and RADIANT BURNERS, INC. will be revived and remain in full force as the only agreement between the parties hereto.

/s/ *Joseph Keig, Sr.*
Joseph Keig, Sr.
/s/ *John O'C. FitzGerald*
John O'C. FitzGerald
/s/ *Victor Neumark*
Victor Neumark
ATTORNEYS
RADIANT BURNERS, INC.
By /s/ *William P. Ayers*
as its President

(SEAL)
Attested by:
/s/ *Alice F. Ayers*
as its Secretary

I hereby personally assent to the provisions of the foregoing agreement.

/s/ *Willidm P. Ayers*
William P. Ayers

(We) I have read the foregoing Agreement and assent thereto.

/s/ *R. F. Levy*
/s/ *Lee A. Freeman*
NEW ATTORNEYS.

EXHIBIT "D"

AMERICAN BAR ASSOCIATION
Standing Committee on Professional Ethics
Re: Informal Opinion No. 870 - 8/4/65
Division of Fees

We have received from you the following letter requesting an answer to the question set forth in your letter:

"Rule No. 34 of the Canons of Professional Ethics of the American Bar Association provides that fees shall be divided between attorneys based on the division of work between all attorneys who participate.

"In September, 1963, at a time when this Canon had not been called to our attention, one of the men in our firm made an arrangement with an attorney in a nearby community in connection with the division of fees in a case now pending in our office. The fees were to be divided on the basis of one-third to him as the 'forwarding attorney' and two-thirds to our firm. We have every reason to believe that our office is about to bring this case to a successful and satisfactory conclusion. The amount of the fee will be $40,000.00, or very close thereto.

"The clients are very much opposed that the original attorney receive any compensation, excepting on a quantum meruit basis. They explain that the reason that they consulted us was that they had been dissatisfied with the original attorney.

"'Original' attorney did very little work on the case—no more than 2%, if that.

"I am enclosing a copy of the letter regarding the division of fee written by a member of our firm, blanking out the name of the attorney to whom the letter was sent. (Enclosure reads as follows: This will confirm our discussion of today that our fee arrangement with Mr. and Mrs. "A" and Mr. and Mrs. "B" is 33⅓% of any settlement prior to suit, and 40% of any recovery after the institution of suit. The division of fees between our offices is to be one-third of the total fees to you and two-thirds to this office.)

"The question that we ask of you: Is our firm bound to honor the agreement in this letter, or is it proper, even at this date, and in spite of this letter, to ask an impartial group to evaluate the percentage of work done by the individual attorney and the amount of work done by our firm, and to divide the fees on that basis?"

When the late Henry S. Drinker, a former chairman of this Committee, wrote his authoritative work on *Legal Ethics*, he devoted an entire section of his book to the subject "The Lawyer's Obligations and Relations to Other Lawyers". The following are quotations from that work:

> "A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court."-(Pg. 194)

"A very great part of a man's comfort, as well as of his success at the Bar, depends upon his relations with his professional brethren. With them he is in daily necessary intercourse, and he must have their respect and confidence, if he wishes to sail along in smooth waters. He cannot be too particular in keeping faithfully and liberally every promise or engagement he may make with them." (Pg. 194)

"A lawyer may not repudiate an oral stipulation, made in return for a favor granted, which cannot be revoked, to admit a certain fact in issue, which at the time could have been proved but now can be, if at all, only with difficulty; this despite his client's insistence and the existence of a court rule making oral stipulations unenforceable.

"A lawyer must also observe the customs of the bar as well as the confidences of another lawyer, although indiscreetly given and improperly received, and although this may entail his withdrawing from the case." (Pg. 194-5)

It is the decision of the Committee that the attorney should not interpose as a reason for not carrying out the agreement he made that the agreement was not ethical. This matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement. When two lawyers have participated in an unethical agreement one of them should not, where no one else is involved, set up the unethical agreement against the other.

PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 14 1969
JOHN F. DAVIS, CLERK

No. 391

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN O'C. FITZGERALD and CHARLES F. MARINO,
Petitioners,

vs.

LEE A. FREEMAN and RICHARD F. LEVY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners, John O'C. FitzGerald and Charles F. Marino, pursuant to Rule 58(2) of the Rules of this Court, respectfully petition this Court for a rehearing of its order, entered on October 20, 1969, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The grounds are as follows:

1. The American Bar Association Special Committee on Evaluation of Ethical Standards has prepared its final draft of the proposed Code of Professional Responsibility. This final draft is dated July 1, 1969, and has now been published in booklet form. It covers contingent fees for legal services and division of fees among lawyers, which are presently dealt with in Canons 13 and 34 of the existing Canons of Ethics on which hinged the decisions of the district court and Court of Appeals in this case.

2. Proposed Canon 2 of the Committee's final draft, provides:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

3. The ethical considerations proposed by the Committee with respect to Canon 2, insofar as they pertain to contingent fees for legal services and division of fees among lawyers, are as follows:

> "EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid . . ."

> "EC 2-22 Without consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may be properly divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable."

4. The disciplinary rules proposed by the Committee with respect to Canon 2, insofar as they are here pertinent, are as follows:

"DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

* * *

(8) Whether the fee is fixed or contingent.

* * *

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client."

5. However, the proposed Canons, as well as the ethical considerations and disciplinary rules fail to resolve the matter involved in this case, namely what powers do trial courts possess to upset contingent fee contracts and award lawyers fees based on quantum meruit where the client does

not complain and there is no evidence of fraud, undue influence, mistake, oppression, extortion or that the fee specified in the contingent fee contract is unreasonable.

6. The rulings of the Court of Appeals and district court in this case conflict with cases, such as *Corsiglia* v. *Hammersmith,* 81 Nev. 387, 404 P.2d 8 (1965), where the Court held that an attorneys' agreement for equal sharing of fees, including extraordinary fees, for services performed during probate regardless of division of work was enforceable absent recognized legal defenses. Here, the Agreement of December 20, 1960 was entered into to compensate Petitioners for work done from the outset of the case to the date of the agreement when the Respondents, Freeman and Levy, entered the case. Freeman and Levy approved the agreement and there could be no question about future division of work between the Petitioners and Respondents because Petitioners had no obligation to perform any further services. (App. 15).

The question here is: Where is the legal profession going with contingent fee contracts, particularly where more than one lawyer and a division of fees is involved? The existing Canons of Ethics provide no satisfactory answer, nor do the proposed Canons. The Court decisions are conflicting. Yet this case provides the vehicle by which this Court can settle the matter and offer the guidelines, which should be adopted by the American Bar Association in the new Code of Professional Responsibility.

7. This Court's decisions have dealt with Canons of Ethics previously in cases such as *NAACP* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963), *Brotherhood*

of R.R. Trainmen v. *Virginia,* 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), and *United Mine Workers* v. *Ill. State Bar Ass'n,* 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967).

Respectfully submitted,

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CERTIFICATE

Petitioners, John O'C. FitzGerald and Charles F. Marino, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay and further is restricted to grounds as specified in Rule 58(2) of the Rules of this Court.

JOHN O'C. FITZGERALD, *pro se*
CHARLES F. MARINO, *pro se*